

Exhibit A

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13 UNITED STATES DISTRICT COURT
14
15 CENTRAL DISTRICT OF CALIFORNIA

16 FOREMOST GROUPS, INC. f/k/a
17 FOREMOST INTERNATIONAL
18 TRADING CO., INC.,

19 Plaintiff,

20 vs.

21 AYERS BATH (USA)
22 CORPORATION,

23 Defendant.

Case No. CV11-7473 GAF (Ex)
Hon. Gary A. Feess
Courtroom 740

**BRIEF IN FURTHER SUPPORT OF
APPLICATION FOR PRELIMINARY
INJUNCTION**

Hearing Date: November 21, 2011
Hearing Time: 9:30 a.m.
Hearing Location: Courtroom 740

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23 **I. PRELIMINARY STATEMENT**

24 Plaintiff Foremost Groups, Inc. f/k/a Foremost International Trading Co., Inc.
25 (“Foremost” or “Plaintiff”) respectfully submits this reply brief in further support of
26 its request for the entry of a Preliminary Injunction pursuant to Fed. Rules Civ. P.
27 65 restraining and enjoining Defendant Ayers Bath (USA) Corporation (“Ayers” or
28 “Defendant”) and its officers, agents, servants, employees, and all those in active
concert or participation with Defendant, from (1) selling, distributing and/or
offering for sale all Tangshan Huida Ceramic Group Co., Ltd. (“Huida”) products,

1 including but not limited to toilets and kitchen and bathroom sinks, in the
2 United States and Canada in violation of Foremost's exclusive distribution
3 agreement; and (2) infringing on Foremost's unique MaP Label.

4 In its application, Foremost demonstrated the factors necessary for injunctive
5 relief because Foremost is confronted with the prospect of substantial harm if
6 Ayers' unrelenting unlawful conduct is permitted to continue unabated. Indeed, it
7 required the commencement of this action to force Ayers to cease, for the time
8 being at least, its sale of toilets with packaging containing the Foremost MaP Label.
9 Ayers' promise to no longer use the Foremost MaP Label going forward of course
10 has no impact on the thousands of Ayers' toilets bearing the infringing mark
11 currently sitting on stores shelves across the country, the sale of which irreparably
12 harms Foremost.

13 Ayers attempts to defeat the clear implication that it is selling Huida-
14 manufactured toilets by repeating that its toilets are manufactured by Tangshan
15 Ayers. Far from being a separate and distinct company from Huida, Tangshan
16 Ayers is affiliated with Huida and dependent on Huida for the production of
17 bathroom and sanitary products. Ayers' promotional materials expressly
18 acknowledged this fact until recently, when all mentions of Huida were
19 mysteriously deleted.

20 Ayers is apparently unwilling to cease its infringement on Foremost's
21 exclusive right of distribution and tortious interference with Foremost's business
22 relationships, instead choosing to perpetuate the fiction that its toilets are
23 manufactured by Tangshan Ayers, not Huida, and therefore not within the scope of
24 the Exclusive Distribution Agreement. Accordingly, this Court should grant
25 Foremost's application for preliminary injunctive relief.

26 **II. COUNTER-STATEMENT OF FACTS**

27 Foremost supplements the Statement of Facts submitted with its Application
28 for Preliminary Injunction with the following additional information.

1 Ayers claims that all of its porcelain toilet and sink products sold in the
2 United States are manufactured by Tangshan Ayers Bath Equipment Co., Ltd.
3 (“Tangshan Ayers”). See Declaration of Peter Yao (“Yao Decl.”) at ¶ 5 [Docket
4 No. 16-2]. Huida owns seventy-five (75%) percent of Tangshan Ayers. See
5 Supplemental Declaration of David Bruce (“Bruce Supp. Decl.”) at ¶ 2, Ex. A. The
6 Legal Representative/Business Owner of Huida, Huei-wen Wang, was the Legal
7 Representative of Tangshan Ayers until June 28, 2007. See id. at ¶¶ 2-3, Exs. A and
8 B. The current Legal Representative of Tangshan Ayers is Yen-ching Wang. See
9 id. at ¶ 2, Ex. A. Yen-ching Wang is the son of Huei-wen Wang. See id. at ¶ 4.
10 Yen-ching Wang is also designated in the Exclusive Distribution Agreement as
11 Huida’s assigned liaison. See Declaration of David Bruce (“Bruce Decl.”) at ¶ 7,
12 Ex A. [Docket No. 6].

13 Until recently, Ayers’ promotional materials described Ayers as a “wholly
14 owned corporation of Tangshan Ayers Bath LTD which is a sister company to
15 Huida Ceramic Groups LTD.” See Bruce Suppl. Dec. ¶ 5, Ex. C. Ayers went on to
16 state that: “Through the affiliation of our sister company, we have the capacity to
17 produce over 9 million pieces of products annually with 17 natural gas fed tunnels
18 kilns and 10,000 workers more or less.” See id. The materials have since been
19 amended to remove the references to Tangshan Ayers and Huida, though it
20 continues to attribute Ayers’ production of bathroom and sanitary products to the
21 “affiliation of [Tangshan Ayers’] sister company,” i.e. Huida. See id. at ¶ 6, Ex. D.

22 On July 26, 2011, David Bruce, the Executive Vice President of Foremost,
23 purchased two (2) Ayers’ branded toilets from an Menards’ store in Indiana. See
24 id. at ¶ 7. In addition to being virtually identical in physical appearance to Huida-
25 manufactured toilets sold by Foremost, the toilets contain parts manufactured by
26 Huida. See id. at ¶ 8, Ex. E. Below is a picture of a Huida-manufactured flush
27 valve assembly found in an Ayers’ toilet purchased from Menards:
28



See *id.* at ¶ 8, Ex. E. Menards bought 40,000 pieces of product from Ayers. See *id.* at ¶ 9.¹

LEGAL ARGUMENT

A. FOREMOST IS REASONABLY LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM AGAINST AYERS

Foremost has shown a reasonable likelihood of success on the merits of its claims against Ayers. Contrary to Ayers' assertions in its opposition, Foremost's application sets forth sufficient factual and legal grounds to substantiate claims for infringement on Foremost's exclusive right of distribution, tortious interference with Foremost's prospective economic advantage, tortious interference with Foremost's contractual relations, unfair competition and infringement of Foremost's unregistered trademark.

¹ Ayers has made numerous evidentiary objections to the Declaration of Mr. Bruce. Mr. Bruce will be attending the November 21, 2011 hearing and will be available to testify to the facts as set forth in his Declaration and Supplemental Declaration.

1. **Foremost Has Established a Reasonable Probability of Success on Its Claims for Infringement on Exclusive Right of Distribution and Tortious Interference with Prospective Economic Advantage**

By importing Huida-manufactured products and offering those products for sale to retail stores, wholesale channel and regional dealers in the United States with whom Foremost enjoyed a business relationship or sought to develop one, Ayers has, and continues to, infringe on Foremost's exclusive right of distribution and tortiously interfere with Foremost's business relations with prospective retail stores, wholesale channels and regional dealers. In its opposition, Ayers represents that the porcelain toilets it distributes are manufactured by Tangshan Ayers, not Huida, and therefore its distribution is not a violation of Foremost's exclusive right of distribution. See Yao Decl. at ¶ 5. Ayers also claims that it has not interfered with any economic relation of Foremost's. Neither claim withstands scrutiny.

In investigating the relationship between Ayers, Tangshan Ayers and Huida, Foremost discovered that Huida owns seventy-five (75%) percent of Tangshan Ayers. See Bruce Supp. Decl. at ¶ 2, Ex. A. Huida's Legal Representative/Business Owner, Huei-wen Wang, was the Legal Representative for Tangshan Ayers until June 2007. See Bruce Supp. Decl. at ¶¶ 2-3, Exs. A and B. Tangshan Ayer's current Legal Representative is Yen-ching Wang, Huei-wen Wang's son. See Bruce Supp. Decl. at ¶¶ 2, 4, Ex. B. Yen-ching Wang is also identified in the Exclusive Distribution Agreement as the assigned liaison for Huida. See Bruce Dec. at ¶ 7, Ex. A.

Ayers expressly acknowledged the connection between Tangshan Ayers and Huida in promotional materials and advertisements ("Ayers Bath (USA) Corporation is a wholly owned corporation of Tangshan Ayers Bath LTD which is a sister company to Huida Ceramic Groups LTD") until the materials were recently scrubbed, presumably in response to the commencement of this litigation. See id. at ¶ 5, Ex. C. Ayers' promotional materials continue to contain the following

1 language: “***Through the affiliation of our sister company***, we have the capacity to
2 produce over 9 million pieces of products annually with 17 natural gas fed tunnels
3 kilns and 10,000 workers more or less.” See id. at ¶ 6, Ex. D (emphasis added).

4 Given the above, it now appears clear that Ayers’ distribution of Huida-
5 manufactured toilets is in furtherance of an unlawful scheme between Ayers,
6 Tangshan Ayers and Huida to deprive Foremost of its rights under the Exclusive
7 Distribution Agreement. While Ayers asserts that its toilets are manufactured by
8 Tangshan Ayers, as recently as March 11, 2011 Ayers’ promotional materials
9 attributed Tangshan Ayers’ production of bathroom and sanitary products to its
10 affiliation with Huida. See Bruce Supp. Decl. at ¶ 5, Ex. CB. The factual
11 circumstances lead one to the inescapable conclusion that the bathroom and sanitary
12 products being sold by Ayers in the United States are manufactured by Huida.

13 Ayers attempts to defeat the obvious implication that it is distributing Huida-
14 manufactured products in violation of the Exclusive Distribution Agreement by
15 pointing out superficial differences between Ayers’ toilets and what Ayers claims is
16 a toilet sold by Foremost. As an initial matter, it is highly unlikely that the pictures
17 attached to the Declaration of Jeffrey S. Renzi (“Renzi Decl.”) actually depict a
18 toilet manufactured by Foremost. Mr. Renzi states that he visited a Home Depot
19 home improvement store located at 1675 Wilshire Boulevard, Los Angeles,
20 California and purchased a two-piece toilet sold as “Glacier Bay 2-Piece High-
21 Efficiency Elongated All in One Toilet with Left Tank Lever in Chrome.” See
22 Renzi Decl. at ¶ 9 [Docket No. 16]. Mr. Renzi proceeded to compare the “Glacier
23 Bay” toilet with an Ayers’ toilet of similar height and flush performance in an effort
24 to demonstrate that the Ayers’ toilet differed from the toilet purportedly sold by
25 Foremost. See id. at ¶ 10.

26 While it is true that Foremost provides Home Depot with vitreous china
27 toilets that are subsequently offered to customers under the brand “Glacier Bay,”
28 Foremost is only one of a number of manufacturers that do so. See Bruce Supp.

Decl. at ¶ 10.² Foremost does not ship any vitreous china toilets to the Home Depot regional distribution center that supplies the Home Depot home improvement store located at 1675 Wilshire Boulevard in Los Angeles. See id. at ¶ 12. It is therefore unlikely that the “Glacier Bay” toilet purchased by Mr. Renzi was sold by Foremost. Accordingly, Ayers cannot rely on the comparison photographs attached to Mr. Renzi’s declaration as evidence that Ayers’ toilets differ materially from toilets sold by Foremost.

Moreover, to the extent it was unclear in Foremost’s moving papers, *Ayers’ toilets being sold at Menards contain Huida-manufactured component parts*. See Bruce Supp. Decl. at ¶ 8, Ex. D. Ayers does not deny that its toilets contain such parts, but rather argues that: (1) non-porcelain parts are not within the scope of the Exclusive Distribution Agreement; and (2) Foremost has used non-Huida plastic parts in toilets distributed under the “Glacier Bay” name. With respect to the second argument, as discussed above, it does not appear as if Ayers examined any Foremost toilets sold under the “Glacier Bay” name, regardless it is irrelevant what parts Foremost may use in its toilets.

Concerning the first argument, the scope of the Exclusive Distribution Agreement is not, as Ayers contends, limited to porcelain products. Rather, the Exclusive Distribution Agreement grants Foremost the exclusive right to distribute “Type C Products” in North America. See Bruce Decl. at ¶ 7, Ex. A. The term “Type C Products” is defined in the Exclusive Distribution Agreement as “[i]ndicating the products designed and manufactured all by [Huida].” See id. at ¶ 7, Ex. A. Neither the exclusive distribution clause nor the definition of “Type C Products” limits the scope of the Exclusive Distribution Agreement to porcelain products. The component parts contained in Ayers’ toilets are clearly stamped with

² Each Home Depot “Glacier Bay” toilet carries the same stock-keeping unit or SKU identification code, regardless of manufacturer. See Bruce Supp. Decl. at ¶ 11. The SKU identification codes vary only between models. See id.

1 the designations “Huida” and “Tangshan Huida Ceramic Group Co., Ltd.” See
2 Bruce Supp. Decl. at ¶ 8, Ex. E. Ayers’ distribution of any product designed and
3 manufactured by Huida, including non-porcelain component parts, constitutes an
4 infringement on Foremost’s exclusive right of distribution and tortious interference
5 with prospective economic advantage.

6 Foremost alleges that Ayers infringed on its exclusive right of distribution
7 and intentionally and/or negligently interfered with its prospective economic
8 advantage by offering Huida-manufactured products for sale to retail stores,
9 wholesale channel and regional dealers in the United States with whom Foremost
10 enjoyed a business relationship or sought to develop one, including Ferguson,
11 Lowe’s, HD Supply and Menards. Ayers supports its denials of wrongdoing with
12 an extremely carefully worded declaration from Charles Wang, Ayers’ Vice
13 President of Sales. With respect to Ferguson and Lowe’s, Wang does not deny that
14 he or members of his sales team offered to sell these entities Huida-manufactured
15 products. See Declaration of Charles Wang (“Wang Decl.”) at ¶¶ 4-5 [Docket No.
16 16-3]. Rather, Wang states that neither he nor the members of his sales team “made
17 any in person contacts” with Ferguson or Lowe’s to solicit sales. Foremost never
18 claimed that Ayers’ representatives approached Foremost’s customers in person, in
19 fact the documentary evidence obtained by Foremost suggests that Ayers’ typical
20 practice was to solicit sales by email. See Bruce Decl. at ¶¶ 32-33, Ex B.

21 For example, upon being told by Todd Page, the International Merchandise
22 Manager – Kitchen and Bath for LG Sourcing, Inc., a wholly-owned subsidiary of
23 Lowe’s, that someone from Ayers had approached Lowe’s with an offer to sell
24 them Huida-manufactured products, Bradley Rannow of Foremost asked Mr. Page
25 for the name of the Huida representative and the method of approach. See id. at ¶
26 32, Ex B. Mr. Page replied that he received an email from Ben Liu. See id. at ¶ 33,
27 Ex C. In his declaration, Wang claims that “Ben Liu is not an Ayers Bath
28 employee.” See Wang Decl. at ¶ 6. This statement is hardly sufficient to establish

1 that Ben Liu was not an employee of Ayers in April 2011 when he approached
2 Lowe's with an offer to sell them Huida-manufactured products.

3 Wang's claim that "there are no sales or purchase orders for Ayers Bath
4 products between Ayers Bath" and Ferguson or Lowe's is similarly eyebrow-
5 raising. See Wang Decl. at ¶¶ 4-5. Wang does not state that Ayers has never sold
6 products to Ferguson or Lowe's, or that Ayers did not sell products to Ferguson or
7 Lowe's during the relevant time periods. Wang merely states that there are
8 currently no outstanding orders between Ayers and Ferguson and Lowe's. If true,
9 this is hardly surprising. Following the commencement of this action, Ayers
10 purged its promotional materials of all references to Huida and ceased its use of the
11 Foremost MaP Label. See Bruce Supp. Dec. at ¶¶ 5-6, Exs. C and D; Wang Dec. at
12 ¶ 8. It is clear that Ayers is desperate to appear blameless before the Court,
13 temporarily halting sales to the customers identified by Foremost would be entirely
14 consistent with Ayers' course of conduct up to this point.

15 Messrs. Wang and Yao claim to have not seen a copy of the Exclusive
16 Distribution Agreement prior to this lawsuit, but do not deny having knowledge of
17 its existence or Foremost's reasonable expectation of economic benefit from
18 exclusively selling Huida-manufactured products. See Wang Decl. at ¶ 9; Yao
19 Decl. at ¶ 8. Such a denial would prove troublesome, as it is an uncontradicted fact
20 that Ayers was put on notice on April 21, 2011 that Foremost had an exclusive right
21 of distribution of Huida products in the United States and that Ayers' attempts to
22 sell Huida products constituted infringement of Foremost's exclusive right of
23 distribution. See Bruce Decl. at ¶ 43, Ex. C.

24 Following the receipt of the April 21, 2011 notification, Ayers had
25 knowledge of the economic advantage Ayers derived from its exclusive sale of
26 Huida-manufactured products in the United States and Canada. See id. at ¶ 43, Ex.
27 C. While Ayers is correct that, in order to recover for intentional or negligent
28 interference with prospective economic advantage, a plaintiff must plead and prove

1 “the defendant's interference was wrongful ‘by some measure beyond the fact of the
2 interference itself,’” see Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11
3 Cal.4th 376, 392–393, 902 P.2d 740 (1995) (citations omitted), “an act is
4 independently wrongful if it is unlawful, that is, if it is proscribed by some
5 constitutional, statutory, regulatory, common law, or other determinable legal
6 standard an act must be wrongful by some legal measure, rather than merely a
7 product of an improper, but lawful, purpose or motive.” Korea Supply Co. v.
8 Lockheed Martin Corp., 29 Cal.4th 1134, 1159, 63 P.3d 937 (2003) (citations
9 omitted). In selling Huida-manufactured toilets to Menards despite its knowledge
10 of Foremost’s exclusive right or distribution, Ayers intentionally and wrongfully
11 interfered with Ayer’s prospective economic advantage, resulting in a lost sales
12 opportunity. See Bruce Decl. at ¶¶ 50-54.

13 The cumulative weight of the evidence compels a finding that Foremost is
14 likely to succeed on the merits of its claim for infringement on exclusive right of
15 distribution and tortious interference with prospective economic advantage. The
16 toilets sold by Ayers to retailers such as Menards are virtually identical to
17 Foremost’s Huida-manufactured toilets and contain component parts admittedly
18 and undeniably manufactured by Huida. See Bruce Dec. at ¶ 51, Ex. G; Bruce
19 Supp. Decl. at ¶ 8, Ex. E. Tangshan Ayers is owned by Huida. Bruce Supp. Decl.
20 at ¶ 2, Ex. A. The companies’ principals overlapped during all relevant periods.
21 See Bruce Dec. at ¶ 7, Ex. A; Bruce Supp. Decl. at ¶ 3, Ex. B. Ayers’ promotional
22 materials expressly acknowledged the relationship between Ayers, Tangshan Ayers
23 and Huida and attributed Tangshan Ayers’ products to its affiliation with Huida
24 until it was recently modified to remove the incriminating statements. See Bruce
25 Supp. Decl. at ¶¶ 5-6, Exs. C and D. Ayers offered Huida-manufactured products
26 for sale to retail stores, wholesale channel and regional dealers in the United States
27 with which Foremost had a business relationship or sought to enter into one,
28

1 resulting in lost business opportunities for Foremost. See Bruce Decl. at ¶¶ 23, 28,
2 32, 38 and 49-50.

3 Based on the foregoing, Foremost has demonstrated a likelihood of success
4 on the merits on its claims for infringement on exclusive right of distribution and
5 tortious interference with prospective economic advantage.

6 **2. Foremost Has Established a Reasonable Probability of**
7 **Success on Its Claim for Tortious Interference with**
8 **Contractual Relations**

9 Ayers' opposition to Foremost's claim for tortious interference with
10 contractual relations rests on its that assertion Ayers' products are not manufactured
11 by Huida. However, as discussed at length above, the facts prove otherwise.
12 According to Ayers, all of its toilets and sink products are manufactured by
13 Tanghsan Ayers. See Yao Decl. at ¶ 5. Given the overlapping corporate structure
14 between Tanghsan Ayers and Huida and Ayers' previous admission that Tanghan
15 Ayers' production of bathroom and sanitary products is only possible due to its
16 affiliation with Huida, it is apparent that Tangshan Ayers is obtaining products
17 from Huida. See Bruce Supp. Dec. at ¶¶ 2-5, Exs. A, B and C. As an active
18 participant in this artifice, Ayers is liable for tortious interference with
19 contractual relations.

20 Ayers' denial of knowledge of the Exclusive Distribution Agreement also
21 rings hollow. As an initial matter, the relationship between Ayers, Tangshan Ayers
22 and Huida not only suggests that Ayers would have full knowledge of Huida's
23 commitment to Foremost as its exclusive distributor of products in North America,
24 but that Ayers was the vehicle through which Huida sought to circumvent its
25 contractual obligations. At the time he signed the Exclusive Distribution
26 Agreement on behalf of Huida, Huei-wen Wang was also serving as Tangshan
27 Ayer's legal representative. See Bruce Decl at ¶ 7, Ex. A; Bruce Suppl. Decl. at
28 ¶ 2, Ex. A. Huei-wen Wang's son, Yen-ching Wang, who is identified in the
Exclusive Distribution Agreement as the "assigned liaison" for Huida, is the current

1 Legal Representative of Tangshan Ayers. See Bruce Decl at ¶ 7, Ex. A; Bruce
2 Suppl. Decl. at ¶¶ 2, 4, Ex. A. Even if Peter Yao had “not seen a copy of the
3 [Exclusive Distribution Agreement]” prior to the initiation of this lawsuit, as he
4 claims in his Declaration, it is ludicrous to think that, as a former executive of
5 Tangshan Ayers, he would have been unaware of its existence. See Yao Decl. at ¶
6 8. In addition, it is undisputed that Ayers had knowledge of Foremost’s exclusive
7 right of distribution of Huida products in the United States and Canada in April
8 2011. See Bruce Decl. at ¶ 44, Ex. C.

9 In representing to retail stores and wholesale distributors that Ayers had the
10 right to import and distribute Huida products in the United States, despite its actual
11 knowledge of the Exclusive Distribution Agreement, Ayers undermined Foremost’s
12 contractual relationship with Huida. See Bruce Decl. at ¶ 40. Based on the
13 foregoing, there is a high likelihood of success on the merits on Foremost’s claim
14 that Ayers tortiously interfered with Foremost’s contractual relations. See
15 Queliman v. Stewart Title Guar. Co., 19 Cal.4th 26, 55, 960 P.2d 513 (1998).

16 **3. Foremost Has Established a Reasonable Probability of**
17 **Success on Its Claims Grounded in Trademark Law**

18 Foremost believes it will ultimately prevail on the merits of its trademark
19 infringement claims because: (1) Foremost owns the Foremost MaP Label; (2)
20 Ayers is using the Foremost MaP Label without authorization; and (3) Ayers’
21 infringing use of the Foremost MaP Label is likely to cause confusion. Ayers seeks
22 to avoid culpability for its infringement of the Foremost MaP Label on a number of
23 grounds, none of which can withstand scrutiny.

24 **a. The Trademark Infringement Issue is Not Moot**

25 Ayers claims that it has ceased to place the Foremost MaP Label on
26 packaging for Ayers’ toilets and therefore the issue of trademark infringement is
27 now moot. This is incorrect. As an initial matter, without an order from the Court,
28 there is nothing stopping Ayers from renewing its infringing use of the Foremost

1 MaP Label at any time in order to trade off the success Foremost has achieved as a
2 result of its use of the Foremost MaP Label and years of distributing vitreous china
3 products. More pressing, however, are the thousands of Ayers' toilets bearing the
4 Foremost MaP Label currently sitting on shelves of retailers across the country.

5 Foremost first learned of Ayers' use of the Foremost MaP Label when it
6 purchased two (2) Ayers' toilets from Menards that carried the infringing mark.
7 See Bruce Decl. at ¶ 52, Ex. F. Menards bought 40,000 pieces of product from
8 Ayers. See Bruce Supp. Decl. at ¶ 9. Given the volume of Ayers' toilets bearing
9 the Foremost MaP Label that likely remain in the marketplace, Ayers' assurance
10 that "as of [October 25, 2011], none of the packaging for the products *at Ayers*
11 *Bath's warehouses* has the [Foremost MaP Label]" provides little comfort. See
12 Wang Decl. at ¶ 8 (emphasis added). Foremost is entitled to the entry of a
13 preliminary injunction ordering Ayers to remove all toilets carrying the offending
14 packaging from stores.

15 **b. Foremost Has a Valid Trademark**

16 Ayers' arguments that Foremost does not make an adequate showing that it
17 has a valid trademark fail as a matter of law. In quoting Professor J. Thomas
18 McCarthy's treatise *McCarthy on Trademarks and Unfair Competition*, Ayers
19 confuses his comments on the functions of a trademark with the requirements of a
20 trademark. The requirements for trademark protection are clearly set forth in
21 section 45 of the Lanham Act. 15 U.S.C. § 1447. A trademark is a "word, name,
22 symbol, or device, or any combination thereof" that is adopted and used by a
23 manufacturer or merchant in commerce "to identify and distinguish [its] goods,
24 including a unique product, from those manufactured or sold by others and to
25 indicate the source of the goods, even if that source is unknown." See id. The
26 Foremost MaP Label is a symbol that Foremost has used in commerce since 2007
27 to communicate that the toilets that Foremost sells meet the industry's highest
28

1 standard for testing and certification. See Bruce Decl. at ¶ 14. The Foremost MaP
2 label is thus entitled to protection as a trademark.

3 Ayers’ argument that the Foremost MaP Label must serve to identify
4 Foremost as the source of its goods is also incorrect as a matter of law. Section 45
5 of the Lanham Act expressly acknowledges that a symbol may indicate the source
6 of the goods, “even if that source is unknown.” 15 U.S.C. § 1447. The symbol
7 need does not need to explicitly reference Foremost in order to communicate the
8 toilets’ origin. See Qualitex Co. v. Jacobson Products Co., Inc., 514 U.S. 159, 163
9 115 S.Ct. 1300 (1995). All toilets distributed by Foremost are packaged with the
10 Foremost MaP Label. See Bruce Decl. at ¶ 15. Therefore, while the Foremost MaP
11 Label does not specifically denote Foremost as the source of the toilets, the uniform
12 presence of the Foremost MaP Label on packaging of toilets distributed by
13 Foremost signifies the source of the toilets to the customer.

14 The Foremost MaP label also serves to signify “that all goods bearing the
15 trademark are of an equal level of quality,” see McCarthy, J. Thomas, *McCarthy on*
16 *Trademarks and Unfair Competition*, § 3.2 (West 2011) (footnotes omitted)
17 (hereinafter “McCarthy”), as each Foremost MaP Label communicates that the
18 toilet has been subject to MaP testing and received the highest certification
19 available. See Bruce Decl. at ¶ 13. Finally, the law does not require that the
20 Foremost MaP Label serve the function of being a “prime instrument in advertising
21 and selling” Foremost’s products, but simply that it be used “to identify and
22 distinguish [Foremost’s] goods, including a unique product, from those
23 manufactured or sold by others.” 11 U.S.C. § 1447.

24 Accordingly, Foremost has established that the Foremost MaP Label is a
25 valid trademark.

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28 ///

c. Ayers' Use of the Foremost MaP Label Creates a Likelihood of Confusion

It is clear that Ayers' use of the Foremost MaP Label is likely to cause confusion in the minds of the public. The Ninth Circuit has held that the similarity of the marks in question, together with the relatedness of the goods or services and the use of a common marketing channel, constitute the "controlling troika in the [likelihood-of-confusion] analysis." GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1205 (9th Cir. 2000). Here, the labels used by Foremost and Ayers do not "appear similar," they are identical. The second factor in the controlling subset also weighs heavily in Foremost's favor. Related or proximate goods are those "which compliment one another, are sold to the same class of consumers, or are similar in use and function." See Mallard Creek Indus. v. Morgan, 56 Cal.App.4th 426, 436, 65 Cal.Rptr.2d 461 (Cal. Ct. App. 1997). Here, the products at issue are toilets, and thus could not be more related or proximate.

Finally, Foremost and Ayers rely on the same marketing channels to reach customers. "Convergent marketing channels increase the likelihood of confusion." AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 535 (9th Cir. 1979). Foremost and Ayers both reach customers through retail stores, wholesale channel and regional distributors that sell toilets.

In sum, an evaluation of the factors that make up the crucial body of the likelihood-of-confusion analysis demonstrate that Ayers' use of the Foremost MaP Label creates a substantial likelihood of confusion. Foremost is therefore likely to prevail on its claim for unfair competition under section 43 of the Lanham Act. Foremost is equally likely to prevail on its state law claims for unfair competition and infringement of unregistered trademark, as, under California law, a party's showing that it is likely to prevail on a federal claim for unfair competition is sufficient to establish that it is likely to succeed on the merits of its state law claims for unfair competition and trademark infringement. See Truong Giang Corp. v.

1 Twinstar Tea Corp., No. C 06-03594, 2007 WL 1545173, at *4 (N.D. Cal. May 29,
2 2007) (citing Cleary v. News Corp., 30 F.3d 1255, 1262-93 (9th Cir. 1994)).

3 **B. FOREMOST SATISFIED PRELIMINARY INJUNCTION**
4 **STANARDS**

5 Ayers also contends that Foremost has failed to demonstrate irreparable harm
6 because Foremost cannot point to any actual harm in the form of “tangible
7 injuries.” [Docket No. 16 at 20:26]. Such actual harm is not necessary in
8 trademark cases; where a likelihood of confusion is established, irreparable harm is
9 presumed. See International Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819,
10 822 (9th Cir.1993) (citing Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 613
11 (9th Cir.1989)). Said another way, the law presumes, and does not require a
12 trademark holder to show, that a likelihood of confusion causes a trademark holder
13 to lose control over the infringed mark and lose the goodwill associated therewith.
14 See, e.g., Apple Computer, Inc. v. Formula Int’l, Inc., 725 F.2d 521, 526 (9th Cir.
15 1984). Thus, Foremost is suffering harm to its goodwill and trademark, and this is
16 precisely the type of harm that makes a preliminary injunction warranted
17 and necessary.

18 In addition, Ayers’ infringement on Foremost’s exclusive right of distribution
19 and tortious interference with Foremost’s prospective economic advantage is
20 causing Foremost to actually suffer immediate, irreparable harm to its reputation
21 and goodwill. It is well-settled in the Ninth Circuit that the loss of goodwill and
22 reputational harm constitute irreparable harm. See Ticketmaster L.L.C. v. RMG
23 Technologies, Inc., 507 F.Supp.2d 1096, 1115 (C.D. Cal. 2008) (citations omitted);
24 Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F.Supp.2d. 1197, 1215
25 (C.D. Cal. 2007). Ayers solicited Foremost’s customers with offers to sell them
26 Huida products at significantly lower costs. See Bruce Decl. As a result of Ayers’
27 wrongful conduct, Foremost has lost business opportunities and been forced to
28 mollify customers aggrieved by Ayers’ sale of products for which Foremost has the

1 exclusive right to distribute. See Bruce Decl. at ¶¶ 28, 35, 40, 50-54. Going
2 forward, there is a danger that retailers and dealers will refuse to do any further
3 business with Foremost.

4 Based on the foregoing, Foremost has sufficiently shown that Ayers'
5 continuing egregious conduct will result in the loss of past and potentially future
6 purchases of their vitreous china products. It is evident that Ayers' actions will
7 result in the complete loss of Foremost's goodwill and reputation. If such actions
8 are permitted to continue unhindered by judicial intervention, the negative impact
9 and harm suffered by Foremost will be irreversible and unable to be remedied by
10 monetary damages. A judgment for affirmative relief of damages after years of
11 litigation could not begin to redress the resultant damage to Foremost. For these
12 reasons, Foremost has established irreparable harm.

13 Moreover, the overwhelming hardship to Foremost in the instant matter
14 provides an independent basis for the relief sought herein. See, e.g., Rodeo
15 Collection, Ltd.v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987). Again,
16 Foremost has suffered and will continue to suffer, both as a matter of fact and a
17 matter of law, serious harm to its trademark and goodwill as a result of Ayers'
18 unauthorized use of the Foremost MaP Label. Furthermore, the vast harm
19 Foremost will continue to suffer if an injunction is not issued by virtue of Ayers'
20 continued infringement on Foremost's exclusive right of distribution far outweighs
21 any inconvenience or expense that Ayers may incur by being forced to comply with
22 an injunction.

23 In evaluating the public interest, Ayers not only ignores the harm to
24 Foremost, it also fails to acknowledge the public's interest in avoiding confusion
25 and deception in the marketplace. Consumers will benefit by the issuance of a
26 preliminary injunction as it will eliminate the danger of confusion about the source
27 of the toilets they are purchasing and they will not mistakenly believe Ayers' toilets
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bearing the Foremost MaP Label are somehow affiliated with or sponsored
by Foremost.

III. CONCLUSION

For the foregoing reasons of fact and law, it is respectfully requested that the
Court grant Foremost's application for a preliminary injunction.

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